No. 95-586

In The

Supreme Court of the United States

October Term, 1995

STATE OF WISCONSIN, *et al.*,

Petitioners,

vs.

GERALD R. MUELLER, UNITED STATES DEPARTMENT OF LABOR, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

The "salary basis test" was developed by the Department of Labor, pursuant to express congressional delegation, as one aspect of the definition of the executive, administrative and professional exemptions to the Fair Labor Standards Act. Its rationale has been repeatedly re-examined in response to comments received from the private and public sectors. In 1992, the Department of Labor adopted a final rule providing special limited accommodations for application of the salary basis test to public employers. The State of Wisconsin argues that the rule should provide greater accommodation than that provided by the informed rulemaking authority of the Department of Labor.

The question presented is:

> Must 29 C.F.R. § 541.118(a)(5), which was promulgated pursuant to the rulemaking authority of the Department of Labor, be invalidated to accommodate the policies and practices of the State of Wisconsin?

LIST OF PARTIES

Respondents concur with Petitioners' List of Parties with the following correction:

Ronald J. Strak was omitted from Petitioners' List of Parties. Mr. Strak consented to become a party plaintiff on January 3, 1993 and said consent was filed with the District Court on January 14, 1993.

Richard E. Stark was included in Petitioners' List of Parties. Mr. Stark withdrew his consent to become a party plaintiff on May 17, 1993.

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OPINIONS BELOW

Respondents concur with Petitioners' statement of the Opinions Below.

STATEMENT OF JURISDICTION

Respondents concur with Petitioners' jurisdictional statement.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

There are no constitutional provisions relevant to the issue presented by this case. The federal statutes involved are: 29 U.S.C. § 203; 29 U.S.C. § 204(a)(f); 29 U.S.C. § 207(a)(1); and 29 U.S.C. § 213(a). App. 51-52, Resp. App. 10a. The federal regulations involved are; 29 C.F.R. § 541.1; 29 C.F.R. § 541.2; 29 C.F.R. § 541.3; 29 C.F.R. § 541.118(a)(5) and 29 C.F.R. § 541.5d (1992). App. 56-60, 66.

Additional relevant material is contained in Respondents' Appendix (S. Ct. Rule 14.1(k)(v)). This includes: a January 15, 1986 USDOL Letter Ruling (Resp. App. 1a-4a); a January 9, 1987 USDOL Letter Ruling (Resp. App. 5a-6a); an August 17, 1995 WisDOT E-Mail News Bulletin (Resp. App. 7a); and an excerpt from 131 Cong. Rec. S14047-48 (Statement of Sen. Metzenbaum) (Resp. App. 8a-9a).

STATEMENT OF THE CASE

A. Statement of Facts

Petitioners initiate their Statement of Facts with the comment that "the factual findings of the district court are

undisputed." While this statement is not wholly inaccurate, it must be noted that many of the findings of the District Court included in its findings of fact were actually conclusions of law which were both implicitly and explicitly reversed by the Seventh Circuit Court of Appeals.[1]

On December 3, 1992, Respondents brought the present action against Petitioner State of Wisconsin and its named agencies and employees to recover unpaid overtime compensation, liquidated damages and reasonable counsel fees under the provisions of the Fair Labor Standards Act.

It is undisputed in the record that Respondents have been subject to unpaid disciplinary suspensions of less than one work week for infractions of rules other than safety rules of major significance, and that such suspensions have actually been imposed on members of the plaintiff class during the time periods relevant to this action. It is also not disputed that the imposition of such non-safety related unpaid suspensions is inconsistent with the Department of Labor's salary basis test, and is a conclusive indicator that the plaintiff class is entitled to the protections afforded by the Fair Labor Standards Act. App. 5, 31, 111, 115-117. *See, e.g., Klein v. Rush Presbyterian - St. Luke's*, 990 F.2d 279, 285 (7th Cir. 1993); *Avery v. City of Talladega*, 24 F.3d 1337, 1341-42 (11th Cir. 1994).

The District Court expressly recognized that the imposition

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1. Specifically, Petitioners refer to the District Court's "findings of fact" that "[d]ifferentiating discipline between employes because they are exempt or nonexempt would undermine the validity of the discipline, violate Wisconsin's labor relations laws, create dissension and morale problems among its work force and violate its employees' state and federal constitutional rights . . ." Petition at 3-4, *citing* App. 16. (Respondents adopt Petitioners' Appendix for reference herein as "App.-__." Respondents' Appendix shall be referred to herein as "Resp. App.-__.")

of non-safety related unpaid disciplinary suspensions of less than one week was inconsistent with Department of Labor Regulations — and Seventh Circuit authority interpreting such regulations — defining the narrow professional, executive and administrative exemptions to the Fair Labor Standards Act. App. 31. Despite this recognition, and without citation, the District Court then proceeded to invalidate federal law to accommodate the State of Wisconsin's disciplinary policies and practices. The District Court reached this unsupported conclusion by finding that it would be inconsistent with congressional intent to apply that portion of the salary basis test contained in 29 C.F.R. § 541.118(a)(5) to the public sector. App. 34-35.

The Seventh Circuit Court of Appeals reversed. The Court of Appeals first stated that the regulation at issue (29 C.F.R. § 514.118(a)(5)) was one promulgated pursuant to express congressional delegation, and therefore, need only be rationally related to the objectives of the Fair Labor Standards Act. App. 5. *(Citing Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45). After concluding that § 541.118(a)(5) "easily" passed this liberal test, the Court of Appeals held that the State of Wisconsin's articulated policy and **demonstrated practice** of imposing unpaid suspensions inconsistent with 29 C.F.R. § 541.118(a)(5) conclusively established that the plaintiff class was entitled to overtime compensation in accordance with the mandates of the Fair Labor Standards Act.[2] The Court of Appeals expressly rejected the State

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2. In its Petition, the State of Wisconsin stated that "[t]he court of appeals found Wisconsin forfeited the exemption as to all of the engineers simply by asserting it reserved the right to impose suspensions for periods other than for full workweeks for infractions other than safety rules of major significance." Petition at 5, *citing to* App. 5 and 8. This is misleading. The holding of the Court of Appeals was based on the undisputed factual finding that such suspensions had actually been imposed on the Plaintiff class. App. 5,

(Cont'd)

of Wisconsin's argument that the public employers were "compelled" to impose this narrow range of discipline on all State employees. App. 7.

The real issue presented by this petition is whether the State of Wisconsin must pay its employees in accordance with the mandates of federal law, or whether federal law must be modified to accommodate the policies and practices of the State of Wisconsin.

B. History

In *Garcia v. San Antonio*, 469 U.S. 528 (1985), this Court held that Congress had contravened no affirmative limit on its power under the Commerce Clause in affording public sector employees the protections of the wage and hour provisions of the FLSA. In so holding, this Court stated that:

> we perceive nothing in the overtime and minimum-wage requirements of the FLSA, as applied to SAMTA, that is destructive of state sovereignty or **violative of any constitutional provision.**

Id. at 554 (emphasis added).

Following the *Garcia* decision, Congress passed the Fair Labor Standards Amendments of 1985, which provided a

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(Cont'd)

31. This case does not present a question of whether the mere articulation of a policy is enough to forfeit the exemptions, as Petitioners seem to imply. It would be improper for this court to grant a petition on the basis of facts not before the court. *See* S.Ct. Rule 14.1(g).

temporary adjustment period affording public sector employers the opportunity **"to achieve full compliance with the requirements of the law."** 131 Cong. Rec. S14048 (October 24, 1985) (statement of Sen. Metzenbaum, principal co-sponsor of the bill; emphasis added). Resp. App. 8a-9a. These Amendments also made certain special accommodations for public employers allowing for the payment of overtime with compensatory time in lieu of cash wages, made special rules for volunteers in the public sector and added a provision eliminating public employer liability for periods prior to the *Garcia* decision. *See* Pub. L. 99-150, 99 Stat. 787 (1985). This was the full scope of accommodation that Congress provided for the public sector.

29 U.S.C. § 213(a)(1) provides for the exemption of executive, administrative and professional employees from the minimum wage and overtime provisions of the FLSA as follows:

> **§ 213(a) Minimum wage and maximum hour requirements**. The provisions of sections 6 ... and 7 ... shall not apply with respect to —
>
> > (1) **any employee** employed in a bona fide executive, administrative, or professional capacity . . . (as such terms are defined and delimited from time to time by regulations of the Secretary, subject to the provisions of the Administrative Procedure Act . . .). (emphasis added).

App. 52.

The FLSA charges the Secretary of Labor with responsibility to define and delimit the executive, administrative,

and professional exemptions to the FLSA.[3] The Department's regulations defining these exemptions have the force and effect of law. *Batterton v. Francis*, 432 U.S. 416, 425 (1977). The Department's regulations, promulgated pursuant to the rulemaking procedures of the Administrative Procedure Act, set forth separate tests for the professional, administrative and executive exemptions from the wage and hour provisions of the FLSA. Each test contains a set of criteria which must be satisfied to qualify for the exemption, and the courts have uniformly held that an employee must satisfy all of the applicable criteria to qualify. *Wirtz v. C & P Shoe Corp.*, 336 F.2d 21 (5th Cir. 1964); *Wirtz v. Williams*, 381 F.2d 613 (5th Cir. 1967); *Klein v. Rush Presbyterian - St. Luke's*, 990 F.2d 279 (7th Cir. 1993) (hereinafter "Klein").

Common to each of the executive, administrative and professional exemptions is the requirement that an employee be compensated on a "salary basis." *See* 29 C.F.R. §§ 541.1 - 541.3, App. 56-58. The regulations defining "salary basis" provide that an employee will be considered to be compensated on a salary basis if the employee

> . . . regularly receives each pay period a

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3. Petitioners discuss at length the manner in which the FLSA has been administered to federal employees by Civil Service Commission (CSC) and its successor, Office of Personnel Management (OPM). This discussion is irrelevant. The law is clear that the Agency responsible for the administration of the FLSA to State and Local governments is the United States Department of Labor. *See* 29 U.S.C. §§ 204(a), (f) and 213(a)(1). The delegation of authority to CSC was a delegation which explicitly covered **only** its application to the federal government; it left administration of the FLSA regarding **all other covered entities** to the Department of Labor. 29 U.S.C. § 204(f). *See, e.g., American Federation of Government Employees v. OPM*, 821 F.2d 761, 770 (D.C. Cir. 1987); *Ahern v. State of New York*, 807 F. Supp. 919, 922 n.4 (N.D. N.Y 1992), *aff'd*, 3 F.3d 581 (2d Cir. 1993), *cert. denied.*, 114 S. Ct. 1187 (1994).

> predetermined amount constituting all or part of the employee's compensation, and the predetermined amount is not subject to reduction because of variations in the quality or quantity of work performed. Subject to specified exceptions, the employee must receive the full salary for any week in which any work is performed, without regard to the number of days or hours worked . . .

29 C.F.R. § 541.118. App. 66.

Under the regulations, an employee who is subject to unpaid disciplinary suspensions of less than one week for infractions of rules other than safety rules of major significance is entitled to the wage and overtime protections of the Fair Labor Standards Act. App. 66-68, 115-117. *See, e.g., Klein v. Rush Presbyterian - St. Luke's*, 990 F.2d 279, 285 (7th Cir. 1993); *Avery v. City of Talladega*, 24 F.3D 1337, 1341-42 (11th Cir. 1994).[4]

On November 19, 1985, the Department of Labor published in the Federal Register (50 Fed. Reg. 47696) an advance notice of proposed rulemaking requesting the views of the public on **any changes they felt were necessary in 29 C.F.R. § 541**. App. 83-84. The notice specifically solicited comments on suggested

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4. Petitioners make the disingenuous argument that § 541.118(a)(5) regards all non-safety related suspensions, even those issued for more than one week, as inconsistent with salaried status. Petition at 7. No court, administrative interpretation or administrative regulation of which Respondents are aware has ever made a finding consistent with this assertion. It has been uniformly held that the only unpaid suspensions inconsistent with salaried status are those of less than one week issued for nonsafety related infractions. App. 6, 30, 116-117. Further, it is undisputed that the facts before this Court only involve unpaid suspensions of less than one week issued for non-safety related infractions. *Id.*, App. 17.

changes to the "salary basis test", and asked the public to comment on whether the Department should provide any special accommodations to public sector employers. 50 Fed. Reg. 47697, App. 84. *See also* 57 Fed. Reg. 37668, App. 95.

In January 1986 (during the course of the temporary adjustment period), the Department of Labor began receiving inquiries from public sector employers regarding application of the salary basis test to its employees. January 1986 USDOL Letter Ruling. Resp. App. 1a-4a. During this period, the Department clearly indicated that the salary basis test was entirely applicable to the public sector. *Id.*

The Department of Labor received a number of comments from public employers responding to its advance notice of proposed rulemaking.[5] In response to these comments, in January of 1987, the Department of Labor adopted a non-enforcement policy with respect to the application of certain aspects of the salary basis test to public sector employers while consideration was being given to proposed changes in the regulations. This nonenforcement policy **did not** suspend application of § 541.118(a)(5) to public sector employers. January 1987 USDOL Letter Ruling. Resp. App. 5a-6a. *See, e.g., Kinney v. District of Columbia*, 994 F.2d 6, 9 (D.C. Cir. 1993); *Yourman v. Dinkins*, 826 F. Supp. 736, 746 (S.D.N.Y 1993).

On September 6, 1991, the Department of Labor adopted an interim final regulation providing certain limited exceptions to the application of the salary basis test to public sector employers, and solicited additional comments for the preparation of any final

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5. The Department of Labor also acknowledged receipt of comments requesting exceptions to application of the salary requirement in response to proposed regulations issued to implement the 1985 FLSA amendments. 57 Fed. Reg. 37662.

rule the Department of Labor considered appropriate. 56 Fed. Reg. 45825, App. 91. The interim final rule **did not** suspend application of 29 C.F.R. § 541.118(a)(5) to the public sector. *Id. See, e.g., Bankston v. State of Illinois*, 60 F.3d 1249, 1253 (holding that interim rule did not suspend application of § 541.118(a)(5) to public sector).

On August 19, 1992, the Department of Labor adopted its final regulation at 29 C.F.R. § 541.5d providing a "special, limited exception from the exemption's requirement for payment 'on a salary basis' . . . for certain public sector pay systems that reduce the pay of otherwise-exempt employees for partial-day absences . . ." 57 Fed. Reg. at 37666, App. 91. In its preamble to this final rule, the Department published and responded to various comments received in the rulemaking process. Among these comments was a request that § 541.118(a)(5) be eliminated from the exemption criteria for public sector employees:

> *Comment*: § 541.118(a)(5) regarding deductions for penalties imposed for infractions of safety rules of major significance should be broadened to include disciplinary suspensions of public sector employees.
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> * * *
>
> In the Department's judgement, the comments have not suggested a sufficient basis for distinguishing between the public and private sectors with respect to any recommended change in the rule [§ 541.118(a)(5)]. Although contrary assertions were made, the comments failed to demonstrate that public employers are

> significantly more restricted in the availability of options with respect to employee discipline than private employers ... In addition, other remedies for disciplinary infractions, such as official reprimands, demotions and reassignment or restriction of duties, are generally available and used in the public sector.

57 Fed. Reg. 37674, App. 111.

The Department of Labor has taken many opportunities to reexamine the salary basis test and to specifically consider its application to the public sector. It has engaged in rulemaking for the express purpose of providing those accommodations that in the agency's informed discretion were appropriate. Through this entire process, the Department has been unwavering in its application of § 541.118(a)(5) to the public sector. The Department's regulations have never prohibited public sector employers from disciplining their employees in the manner they see fit. Section 541.118(a)(5) is merely one aspect of the test used to determine if employees fall within the ambit of one of the FLSA's narrow exemptions. 29 C.F.R. § 541.118(a), App. 66.

REASONS FOR DENYING THE WRIT

The State of Wisconsin's Petition does not meet any of this Court's criteria for granting review.

I.

THERE IS NO CONFLICT BETWEEN THE CIRCUITS REGARDING THE ISSUE RAISED IN THE STATE OF WISCONSIN'S PETITION.

The State of Wisconsin argues that the decision of the Court of Appeals herein and the decision of the Ninth Circuit Court of Appeals, in *Service Employees International Union. Local 102 v. County of San Diego*, 35 F.3d 483 (9th Cir. 1994), "creates an indirect conflict in the circuits." Petition at 10. It would appear that the State's very articulation of the asserted conflict as "indirect" would constitute insufficient grounds to invoke this Court's discretionary exercise of its certiorari jurisdiction. *See e.g.*, R. Stern, E. Gressman, S. Shapiro, K. Geller, *Supreme Court Practice* (7th ed. 1993) at 168 [hereinafter cited as Stern] ("a square and irreconcilable conflict ... ordinarily should be enough to secure review"). Beyond the State's implicit recognition that its asserted conflict is questionable, the fact remains that there is complete uniformity between the circuits on the question before this Court.

The only issue before this Court is the validity of § 541.118(a)(5) as applied to the State of Wisconsin. *Service Employees, supra,* did not involve § 541.118(a)(5). The Ninth Circuit explicitly held that the salary basis test was validly applied to the public sector as it has existed since the interim final rule in September of 1991.[6] *Service Employees*, 35 F.3d 483, 489.

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6. Petitioners attempt to create an "indirect conflict" between the Ninth (Cont'd)

Since all versions of the salary basis test, including those expressly declared by the Ninth Circuit to be validly applied to the public sector, include § 541.118(a)(5) as an exemption criteria for both public and private sector employees, there is no conflict between the circuits.[7]

II.

THE STATE OF WISCONSIN'S PETITION DOES NOT RAISE ANY LEGITIMATE CONSTITUTIONAL ISSUES.

A. The Due Process Clause

The State of Wisconsin argues that it is required by the due process clause to impose progressive discipline on its employees and that, by definition, a system imposing progressive discipline **must** include **unpaid** disciplinary suspensions of less than one week for infractions of minor rules. This is a hollow and baseless assertion.

As Petitioners correctly noted, "progressive discipline seeks

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Circuit's broad articulation that the salary basis test was invalid prior to 1991 and the Seventh Circuit's holding that any part of the salary basis test not specifically addressed by the DOL's 1992 rulemaking was presumed valid. Petition at 11, fn. 2. Conflicts in dicta in distinguishable cases generally do not constitute sufficient grounds for granting a writ. Stern, *supra* at 355.

7. To the extent the State of Wisconsin argues there is an implicit conflict concerning the status of the salary basis test prior to September of 1991, this is a moot point. Given the statute of limitations governing FLSA actions (two years, or three years in the case of wilful violations), the time for filing actions under the pre-1991 rule has long since passed. Therefore, this implicit conflict need not be resolved. *See, e.g., United States v. Abrams*, 344 U.S. 855 (1952); *Community Services, Inc. v. United States*, 42 U.S. 932 (1952).

to rationally assess discipline appropriate to both the severity of the offending conduct and the history of the prior discipline." Petition at 18. Therefore, progressive discipline merely requires the imposition of discipline commensurate with the act being punished or discouraged. No particular type of discipline is required or prescribed by the concept and the salary basis test does not in any way limit the State's ability to impose discipline that is progressive in nature.

In response to a public employer's argument that it must be able to impose unpaid disciplinary suspensions, the court in *Pautlitz v. Naperville*, 781 F. Supp. 1368, 1373, n. 8 (N.D. Ill. 1992) stated:

> Naperville originally maintained that such power is essential to maintaining discipline in the force. While the threat of suspension without pay is certainly a deterrent to misconduct among any employee group, we are not completely convinced that it is the sole effective method. As we pointed out to counsel for Naperville, other effective deterrents may include the threat of demotion, failure to promote, lack of "merit pay" and unfavorable job assignments.

The Department of Labor reached the same conclusion as the *Pautlitz* court:

> In the Department's judgement, the comments have not suggested a sufficient basis for distinguishing between the public and private sectors with respect to any recommended change in the rule [§ 541.118(a)(5)]. Although contrary

> **assertions were made, the comments failed to demonstrate that public employers are significantly more restricted in the availability of options with respect to employee discipline than private employers . . . In addition, other remedies for disciplinary infractions, such as official reprimands, demotions and reassignment or restriction of duties, are generally available and used in the public sector.**

57 Fed. Reg. 37674, App. 111.[8] (Emphasis added.)

Finally, the State's argument must fail because it is based on the faulty premise that "progressive discipline" is unique to public sector employment. Progressive discipline is as much a fact of private sector employment as it is in the public sector, and § 541.118(a)(5) has been applied to private sector employers since 1954.[9] Therefore, the fact that "progressive discipline" is

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8. It is ironic that the State's reaction to the Seventh Circuit Court of Appeals' decision herein was to modify its progressive disciplinary structure to simply not include unpaid disciplinary suspensions of less than one week for non-safety related infractions. WisDot E-Mail News Bulletin. Resp. App. 7a. This is the very option that the Seventh Circuit Court of Appeals said was available to the State, and which the State continues to argue in its Petition is not a viable option for them. App. 7.

9. In fact, collective bargaining contracts in both the public and private sectors typically provide that an employer have "just cause" for any discharge or discipline imposed. It is from such "just cause" provisions that the requirement for progressive discipline is derived. Elkouri & Elkouri, *How Arbitration Works*, 2nd ed. (BNA Publishing 1985) at 652. The private sector is required to have progressive disciplinary systems for professional employees governed by collective bargaining agreements or who otherwise have contracts

(Cont'd)

employed by the State of Wisconsin does not provide any basis for distinguishing it from the private sector in the application of § 541.118(a)(5). There is no valid due process challenge to the validity of the salary basis test. *See, e.g., United States v. Darby*, 312 U.S. 100, 125 (1941) (rejecting a due process challenge to application of FLSA classifications).

B. The Equal Protection Clause

The State of Wisconsin has argued that utilizing unpaid suspensions for infractions other than "safety rules of major significance" as an exemption criteria will result in a system which imposes different penalties to individuals in state service on the basis of FLSA classification and that such a distinction would violate the Equal Protection Clause of the United States Constitution. Petitioners' argument raises no legitimate equal protection concerns.

This Court has clearly stated that litigants have a heavy burden in asserting an equal protection claim. In the absence of a law that distinguishes between classes on the basis of **suspect** (race, religion, national origin) or **quasi suspect** (gender or legitimacy) classifications, the party challenging the law must demonstrate that the classification bears **no rational relationship to a permissible government objective**. *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976); *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61

(Cont'd)
containing just cause provisions. In order for private sector employers to maintain FLSA exemptions of their professional, executive or administrative staff, they cannot subject them to unpaid disciplinary suspensions for infractions of rules other than safety rules of major significance. There is nothing in the concept of progressive discipline that requires the imposition of unpaid suspensions.

(1911); *see also, Peterson v. Lindner*, 765 F.2d 698, 705 (7th Cir. 1985) ("Only if a law is totally arbitrary will it fail.") J. Barron & C. Dienes, *Constitutional Law in a Nut Shell* (West Publishing 1991) at 206.

The State's assertion, therefore, contemplates that an individual would be able to successfully argue that compliance with federally mandated protective labor legislation bears no rational relationship to a permissible government purpose. This argument must clearly fail. *See, e.g., Carleton Screw Products Co. v. Fleming*, 126 F.2d 537, 541 (8th Cir. 1947) (FLSA classifications do not violate equal protection clause).

Congress' express purpose of providing broad federal protection with respect to the wages and hours of this country's labor force is clearly a permissible government purpose. *See, e.g., United States v. Darby*, 312 U.S. 100, 109-110 (1941). There is no good faith argument that the FLSA, or the regulations implementing the Act, bear no rational relationship to the achievement of that end.[10]

C. The Guarantee Clause

The State of Wisconsin suggests that utilizing § 541.118(a)(5) as an exemption criteria impedes the State's ability to maintain a republican form of government as guaranteed by the United States Constitution. This is quite a stretch.

Section 541.118(a)(5) is not a mandate; it is merely one aspect of the criteria developed by the Department of Labor to

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10. It would also follow under the State's argument that distinguishing in the payment of overtime at the federally mandated rate on the basis of FLSA exemption status would be inconsistent with the equal protection clause.

determine whether an employee falls into one of the narrow exemptions from the Fair Labor Standards Act. It is rather difficult to imagine how a criteria used to distinguish between exempt and non-exempt employees under the FLSA impedes a State's ability to maintain a republican form of government.

The FLSA specifically exempts from its coverage state and local employees who hold public elective office, have been appointed by an elected official to serve in a policy making capacity, serve on the personal staff of an elected official, advise an officeholder directly with respect to the constitutional or legal powers of that office, or work in the legislative branch of a state, political subdivision, or agency. 29 U.S.C. § 203(e)(2)(C). App. 51. Congress was mindful to exclude from coverage those State officials who exercised any of the powers of a republican government. *See, e.g., Garcia v. San Antonio*, 469 U.S. 528, 551 n.17 (1985).

The plaintiff employees at issue herein are engineers[11] who do not perform functions related to a republican form of government. The Seventh Circuit questioned appropriately "how the [guarantee] clause relates to the employment of engineers is in any event obscure." App. 7.

As one legal scholar has observed:

> Most state and local employees do not perform functions related to a republican form of government. School teachers, hospital orderlies, garbage collectors, bus drivers, and air traffic controllers do not exercise the lawmaking, adjudicatory, or

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11. Plaintiff class includes employees doing engineering work whether degreed and licensed or not.

> enforcement functions that characterize a republican government. Congress, therefore, may adjust the wages and hours of these and similar employees without diminishing the states' ability to conduct a republican form of government.

Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 Colum. L. Rev. 1, 56 (1988). *See also*, Lewis B. Kaden, *Politics, Money, and State Sovereignty: The Judicial Role*, 79 Colum. L. Rev. 847, 890 (1979); *Garcia*, 469 U.S. 528, 551 (1985) (The Constitution of the United States preserves the autonomy and independence of the States in their **legislative and judicial** departments).

Further, no authority cited by the Petitioners lends any support to its assertion that § 541.118(a)(5) exceeds some affirmative limit on the federal government's legislative authority under the Guarantee Clause. Section 541.118(a)(5) certainly does not run afoul of this Court's holding in *New York v. United States*, 112 S. Ct. 2408 (1992) that it is improper for Congress to compel the States to regulate in a given area; rather, § 541.118(a)(5) is an example of the congressional authority this Court **approved** of in *New York, supra*:

> . . . The Constitution instead gives Congress the authority to regulate matters directly and to pre-empt contrary state regulation. Where a federal interest is sufficiently strong to cause Congress to legislate, it must do so directly; it may not conscript state governments as its agents.

New York, supra, at 2429.

The regulation at issue is not even a mandate, let alone a

requirement that the State of Wisconsin regulate in a given area. This Court's decision in *New York* lends no support to the State's arguments.

Petitioners further look for support in this Court's decision in *Gregory v. Ashcroft*, 501 U.S. __, 111 S. Ct. 2395 (1991). *Gregory* applied an axiom of legislative interpretation called "the plain statement rule": if a congressional statute intends to preempt the historic powers of the States, its intention must be unmistakably clear in the language of the statute. *Gregory*, 501 U.S. at __, 111 S. Ct. at 2401. *Gregory*'s plain statement rule is clearly satisfied here since the FLSA contains **a plain statement of congressional intent to cover public sector employers and employees under its terms**. 29 U.S.C. §§ 203(d)-(e), App. 51. *See, e.g., Biggs v. Wilson*, 1 F.3d 1537, 1544 (9th Cir. 1993); *Hale v. Arizona*, 993 F.2d 1387, 1391 (9th Cir. 1993) (*en banc*).[12]

The Seventh Circuit Court of Appeals properly concluded that there is nothing about the application of § 541.118(a)(5) as an exemption criteria to the plaintiff engineers that is inimical to the Guarantee Clause. App. 7.

D. Conclusion as to the State's Constitutional Arguments

The State of Wisconsin's "web of constitutional provisions"

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12. It is clear that the plain statement rule applies to coverage of the federal law, not application of administrative regulations administering the Act. *Moreau v. Klevenhagen*, 113 S. Ct. 1905, 1912 (1993) (discussing FLSA regulations applicable to State employers without reference to the "plain statement rule"); Craig Becker, *The Check Is in the Mail: Timely Payment Under the Fair Labor Standards Act*, 40 UCLA L. Rev. 1241, 1272 n.157 (1993) ("*Gregory*'s plain statement requirement only makes sense as applied to questions of coverage. To place the same requirement on the content of federal regulations governing the states would require Congress to draft extraordinarily long and detailed statutes in order to effectively regulate the States.").

(Petition at 27) is little more than a smoke screen for the State's simple desire to avoid paying the plaintiff class in accordance with the mandates of federal law. The State argues that, under these mandates, it is **compelled** to issue unpaid suspensions of less than one week for minor, non-safety related infractions. This assertion is belied by the State's actions following the Seventh Circuit Court of Appeal's decision herein.

The State of Wisconsin could have changed its compensation practices to begin compensating the plaintiff class in accordance with the mandates of the FLSA. Instead, the State of Wisconsin modified the very disciplinary structure which it has so vehemently argued it is constitutionally compelled to maintain. Resp.App. 7a. In addition, it modified the disciplinary structure **only with respect to non-exempt employees**, thereby running into the teeth of the very "equal protection problem" about which the State professes to be so concerned. *Id.*

The State's constitutional arguments are so hollow even the State does not appear to believe them. This case presents no legitimate constitutional issues warranting review.

III.

THE STATE OF WISCONSIN'S PETITION DOES NOT RAISE ANY IMPORTANT FEDERAL STATUTORY ISSUES.

A. The Court of Appeals Applied the Proper Legal Standard in Addressing the State's Arguments Concerning the Validity of § 541.118(a)(5).

The State attempts to paint a picture of the Department of Labor as an agency derelict in performing its delegated function. The truth, however, is that the Department has exercised its

statutorily delegated rulemaking authority in a manner which is adverse to the interests of the petitioner. *See, e.g., Bethlehem Steel Corporation v. U.S. E.P.A.*, 782 F.2d 645, 655 (7th Cir. 1986) (holding that an agency's discretion in rulemaking includes the discretion as to whether or not to undertake rulemaking).

The weakness of the State's constitutional arguments — which lead the Seventh Circuit Court of Appeals to be rather dismissive in this regard — clearly reflect the State's awareness that it faces a formidable task in obtaining review of the substance of informed agency action. *See, e.g., Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45.

The State creatively argues that the salary basis test is an interpretation, not a regulation and therefore that § 541.118(a)(5) is not entitled to the high degree of deference accorded by the Court of Appeals.

Section 541.118(a)(5) was promulgated in accordance with the rulemaking procedures of the Administrative Procedures Act and pursuant to express congressional delegation at 29 U.S.C. § 213(a)(1). App. 52. *See also*, 19 Fed. Reg. 1321-22 (Mar. 9, 1954), App. 72-73. As this Court stated in *Batterton v. Francis*, 432 U.S. 416, 425 (1977):

> Unlike the statutory term in Title II, however, Congress expressly delegated to the Secretary [of Labor] the power to prescribe standards for determining what constitutes "unemployment" for purposes of AFDC-UF eligibility. In a situation of this kind, Congress entrusts to the Secretary, rather than to the courts, the primary responsibility for **interpreting** the statutory term. **In**

> **exercising that responsibility, the secretary adopts *regulations* with legislative effect.**

(Emphasis added.)

Batterton's teachings were echoed again by this Court in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44:

> If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the Statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.

In the area of the executive, professional and administrative exemptions to the FLSA, the delegation to the Department of Labor could not be any clearer:

> **§ 213(a) Minimum wage and maximum hour requirements**. The provisions of sections 6 . . . and 7 . . . shall not apply with respect to —
>
> > (1) any employee employed in a bona fide executive, administrative, or professional capacity . . . **(as such terms are defined and delimited from time to time by regulations of the Secretary**, subject to the

> provisions of the Administrative Procedure Act . . .).

29 U.S.C. § 213(a)(1), App. 52.

The Court of Appeals acted properly in according § 541.118(a)(5) the deferential standard articulated by this Court in *Chevron*. *See, e.g., Walling v. General Industries, Co.*, 330 U.S. 545 (1947) (referring to the salary basis test as a regulation); *Avery v. City of Talladega*, 24 F.3d 1337, 1340 (11th Cir. 1994) (according *Chevron* deference to the Secretary's regulation at 541.118(a)(5)); *Service Employees International Union, Local 102 v. County of San Diego*, 35 F.3d 483 (9th Cir. 1994) (same).[13] As noted by the Court of Appeals, § 541.118(a)(5) easily passes muster under the *Chevron* analysis. App. 5.

B. Arguments About Congressional Intent and Public Accountability

Petitioners, in an attempt to overcome the deferential standard of *Chevron*, argue that § 541.118(a)(5) is invalid because it is contrary to congressional intent. The State's implicit

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13. *Skidmore v. Swift*, 323 U.S. 134 (1944) urged by the Petitioners to be controlling did not involve agency regulation adopted through the rulemaking process and pursuant to express congressional delegation. Rather, it involved a bulletin and some informal rulings of the Administrator drafted in the absence of congressional delegation of authority to define the terms in dispute. While *Chevron* is clearly controlling under the current facts, the outcome of this case should be no different if *Skidmore* deference is applied. *See, e.g., EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 260 (1991) (Scalia, J., concurring in part and concurring in the judgment) ("In an era when our treatment of agency positions is governed by *Chevron*, the 'legislative rule vs. other action" dichotomy of *Gilbert* [citation omitted] is an anachronism; and it is not even a correct description of that anachronism to say that *Gilbert* held that EEOC (as opposed to all agency action other than legislative rules) is not entitled to deference.").

reasoning is (1) that Congress could never have intended to violate the Constitution; and (2) Congress could never have intended to require the States to breach principles of public accountability.

Because there are clearly no constitutional concerns in application of § 541.118(a)(5) as an exemption criteria to public employers, the State's first argument warrants no further comment.

The State's musings about public accountability are rather difficult to fathom. Public accountability is rooted in the notion "that governmental employees should not be paid for time not worked, and that there is a need to be accountable to the taxpayers for the expenditure of public funds." 56 Fed. Reg. at 45825. App. 89. *See, e.g., Pautlitz v. Naperville*, 781 F. Supp. 1368, 1370 (N.D. Ill. 1992). The utilization of § 541.118(a)(5) as an exemption criteria does not have any discernable conflict with principles of public accountability. App. 6-7. Indeed, application of § 541.118(a)(5) is merely one of several factors considered in determining whether an employee fits into one of the narrow exemptions to the FLSA. The consequence of an employee not fitting into an exemption is that the employer must pay for the overtime work it receives. The FLSA does not require the employer to pay for something it does not receive. Hence, public accountability is maintained.

The State's historical perspective, while interesting, contributes no support for the State's petition. It is noteworthy that the historical examples provided address the imposition of suspensions without pay on elected and appointed officials. Petition at 20-21. Such persons are already expressly excluded from the FLSA's coverage. 29 U.S.C. § 203(e)(2)(C), App. 51.

In any event, the ability to impose unpaid disciplinary

suspensions has not been taken away from the States. They are free to do so for all employees. Section 541.118(a)(5) is simply one of the criteria used to distinguish between exempt and non-exempt employees under the FLSA. It is completely logical to provide that where, as in the facts before this Court, an employee can be docked a day's pay for leaving a meeting early, then he should also be paid overtime in those instances where attending the very same meeting would cause him to work hours in excess of 40.[14]

The State's musings that Congress never intended the salary basis test to apply to public sector employers is not persuasive nor does it overcome the *Chevron* deferential standard. Indeed, *Chevron* provides that such legislative regulations are given controlling weight unless they are "**manifestly** contrary to the statute." Section 541.118(a)(5) easily clears this hurdle.

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14. It is difficult to imagine that the president of the University of Wisconsin system would be suspended for one day without pay because he left a meeting early like Respondent Russell did in this case. Petition at 12. Indeed, the very absurdity of the State's example lends credence to the rationale of § 541.118(a)(5) as an aspect of the exemption criteria.

CONCLUSION

The State of Wisconsin attempts to invoke this Court's certiorari jurisdiction under every criteria governing the granting of petitions for review. It satisfies none of them. Displeasure with the state of federal law does not constitute a sufficient basis for invoking the jurisdiction of this Court.

The State's Petition should be denied.

Respectfully submitted,

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APPENDIX A — LETTER RULING FROM JANUARY 15, 1986

Letter Ruling: January 15, 1986 (no number assigned)

This is in response to your letter of July 30, with enclosure, in which you request our opinion as to whether _____ Counties, in the State of _____ are compensating their salaried employees "on a salary basis" that is in accordance with the salary requirement contained in section 541.118 of Regulations, 29 CFR Part 541. You specifically want to know whether, under section 541.118, deductions may be made from the salaries of such employees for absences of less than a day. We regret the delay in responding to your inquiry.

Your letter states that in _____ counties virtually all employees are paid on a salary basis. The employees earn sick leave under the sick leave plans of those counties, and use the sick leave on the basis of the hours they work. In a telephone conversation with a member of my staff on October 20, you clarified your inquiry by stating that you request our opinion with regard to the salary basis of payment for employees who would otherwise qualify for exemption under section 13(a)(1) of the Fair Labor Standards Act (FLSA) as bona fide executive, administrative, or professional employees.

You state that where a salaried employee has accrued sufficient sick leave credits and, for example, misses four hours of scheduled work because of illness, the employee is charged for four hours of sick leave and his or her compensation is not affected. However, if such employee has exhausted all earned sick leave and misses four hours of scheduled work because of illness, the employee is docked for the four hours and his or her pay is reduced accordingly. You indicate that it may not be possible under _____ State law to advance sick leave to

employees. You believe that other States have similar problems in paying such employees their full salaries when they work partial days.

Section 13(a)(1) of FLSA provides a minimum wage and overtime pay exemption for any employee employed in a bona fide executive, administrative, or professional capacity as those terms are defined in the appropriate sections of Regulations, 29 CFR Part 541. One requirement for exemption is that the employee be paid "on a salary basis" as discussed in section 541.118.

Deductions which may be made from an employee's compensation without affecting the employee's salary basis of payment are found in sections 541.118(a)(2), (3), and (5). Deductions from the salary of an otherwise exempt employee which would affect the salary basis of payment are found in sections 541.118(a)(1) and (4).

As stated in section 541.118(a)(2), deductions may be made from the salary of an exempt employee when the employee is absent from work for a day or more days for personal reasons, other than sickness or accident. As stated in section 541.118(a)(3), deductions may also be made for absences of a day or more days occasioned by sickness or disability if the deduction is made in accordance with a bona fide plan, policy, or practice of providing compensation for loss of salary occasioned by both sickness and disability. Thus, if the employer's particular plan, policy, or practice provides compensation for such absences, deductions for absences of a day or more days may be made before an employee has qualified under such plan, policy, or made before an employee has qualified under such plan, policy, or practice, and after the employee has exhausted the leave

allowance thereunder. However, deductions from the salary of an otherwise exempt employee for absences of less than a day's duration for personal reasons, or for sickness or disability, would not be in accordance with sections 541.118(a)(2) and (3).

Therefore, in the example you provide where the employee is docked four hours and his or her pay is reduced accordingly, because the employee has exhausted his or her sick leave, the employee would not meet the criteria under 29 CFR Part 541 for exemption under section 13(a)(1) of FLSA.

Where an occasional deduction that is not permitted by section 541.118 is made from the salary of an otherwise exempt employee, the exemption would be lost in that workweek when the deduction is made. However, if such deductions are regular and recurring, we would question whether the employee is actually paid "on a salary basis" and the exemption may be denied in all workweeks in which it is claimed, including those weeks when no deductions are made.

The Fair Labor Standards Amendments of 1985 (Public Law 99-150), which were enacted on November 13, 1985, change certain provisions of FLSA as they relate to employees of State and local governments. The amendments will be effective on April 15, 1986. Prior to that date, the Department of Labor (the Department) will issue regulations as may be required to implement this legislation. We have enclosed a summary of these amendments for your information.

We also wish to point out that on November 19 the Department published an Advance Notice of Proposed Rulemaking in the Federal Register (50 FR 47696) to obtain the views of the public on needed changes in Regulations, 29 CFR

Appendix A

Part 541. The Department is interested in the views of the public with respect to all aspects of the regulations. Comments will be received until January 21, 1986.

We trust the above information will be of assistance to you.

Sincerely,

/s/ Herbert J Cohen
Deputy Administrator

APPENDIX B — LETTER RULING FROM JANUARY 9, 1987

Letter Ruling: January 9, 1987 (no number assigned)

It has come to our attention that some State and local government jurisdictions have statutory provisions which prohibit any employee from being paid for time not actually worked, or not covered by annual, sick, or other type of paid leave. Such statutory provisions conflict with the salary basis of payment as discussed in section 541.118 or 29 CFR Part 541. For example, where an otherwise exempt public employee is absent from work for personal reasons, or is unable to work because of illness or accident, and the employee has not accrued, or has exhausted, paid leave time, such employee is paid only for hours actually worked in accordance with applicable State or local law. This practice is similar to the practice applicable to Federal employees. Consequently, a public employer may make deductions from pay for absence(s) on an hourly basis which is contrary to the position in section 541.118 that deductions may be made only for absence(s) of a day or longer.

Revisions to the provisions of 29 CFR Part 541, including the salary tests, have been under consideration as indicated in the Advance Notice of Proposed Rulemaking (ANPR) published in the *Federal Register* on November 19, 1985 (50 FR 4769). The ANPR was published in order to obtain the views of the public on needed changes in the regulations. A commentor representing public employers has pointed out the problem described above and has proposed changes in section 541.118 that would allow deductions to be made for absence(s) of less that a day, or to eliminate the salary test entirely .

While consideration is being given to proposed changes in the regulations, a nonenforcement policy is being adopted with

regard to the salary basis of payment for otherwise exempt public employees. Wage-Hour will not deny an exemption under section 13(a)(1) to an otherwise exempt public employee whose pay is reduced by deductions for absence(s) of less than a day for personal reasons, or because of illness or accident, because the employee does not have, or has exhausted available paid leave for such absence(s).

This nonenforcement policy will be followed only where the public employer can show that a provision contained in applicable State or local law in effect prior to April 15, 1986, prohibits payments to an employee for absence(s) of the type described above which are not covered by available paid leave. This nonenforcement policy is not intended to affect any employee's rights under section 16(b) of FLSA.

If you have any questions concerning the above policy, please contact OPO, Branch of FLSA enforcement, at FTS 523-7043.

/s/ Paula V. Smith
Administrator

APPENDIX C — VOLUME 5 NO. 34, WISCONSIN DEPARTMENT OF TRANSPORTATION E-MAIL NEWS BULLETIN FROM THURSDAY, AUGUST 17, 1995

Vol. 5 No. 34 WisDot E-Mail News Bulletin
Thursday, August 17, 1995

* * *

DISCIPLINARY CHANGE. Beginning Monday (8/21), WisDOT will be following modified guidelines for disciplining employees who are exempt from the Fair Labor Standards Act provisions. As the result of a recent circuit court of appeals decision, progressive discipline guidelines will be: oral warning(s), written reprimand(s), 5-day suspension(s) without pay, suspensions without pay for two or more full work weeks, and termination. It may not be appropriate to follow this progressive model in all instances, since the level of discipline used depends on the circumstance of each situation. For example, it is possible that a situation would warrant a 5-day suspension even though the employee has never been previously disciplined. Contact CINDY MOREHOUSE (608/266-7023), SUE CHRISTOPHER (608/266-7460), BOB BARNES (608/266-7045), or JESSICA LA ROCQUE (608/266-2974) if you have questions. Sue Christopher (reporter).

* * *

APPENDIX D — EXCERPT FROM 131 CONG. REC. S14047-48 (STATEMENT OF SEN. METZENBAUM)

131 Cong. Rec. S14047-48 (October 24, 1985) (statement of Sen. Metzenbaum, principal co-sponsor of the bill; emphasis added).

> . . . 7 million State and local government employees deserve the protection of the FLSA. That protection has been afforded to workers in the private sector since the New Deal . . . State and local employees should not be treated as second class citizens.
>
> * * *
>
> This bill, which reflects the considerable efforts of many individuals, represents a fair and equitable compromise . . . It is significant that this compromise has been enthusiastically endorsed by the National League of Cities, the U.S. Conference of Mayors, the National Association of Counties, and the National Conference of State Legislators. These public employer groups have praised the bill as "provid[ing] a solution to the problems created by *Garcia* which is balanced and equitable to all parties. It maintains the principles of the Fair Labor Standards Act and at the same time recognizes the special circumstances faced by public employers and public employees.
>
> * * *

Appendix D

The bill, S. 1570 as amended will give state and local governments the flexibility they need to operate without going into the red . . .

Finally by deferring enforcement of the FLSA overtime provisions until April 15, 1986 — 1 year after the *Garcia* decision — the bill provides ample time for State and local governments that have not already done so to achieve full compliance with the requirements of the law.

APPENDIX E — RELEVANT STATUTE

29 U.S.C.S. § 204, as amended in 1974, provides, in relevant part:

> **§ 204. Administrator**
>
> **(a) Creation of Wage and Hour Division in Department of Labor; Administrator.** There is hereby created in the Department of Labor a Wage and Hour Division which shall be under the direction of an Administrator [Secretary], to be known as the Administrator [Secretary] of the Wage and Hour Division. . . .
>
> * * *
>
> (f) **Employees of Library of Congress; administration of provisions by Office of Personnel Management.** . . . the Civil Service Commission [Director of the Office of Personnel Management] is authorized to administer the provisions of this Act . . . with respect to any individual employed by the United States . . .